Summary of Public Comments
MaineCare Benefits Manual
Chapter III, Section 45, Hospital Services

Public Hearing: November 1, 2004

The Department of Health and Human Services held a public hearing on the proposed changes to Chapter III, Section 45, Principles of Reimbursement for Hospital Services, on November 1, 2004 at DHHS, 442 Civic Center Drive, Augusta, Maine. The Department accepted written comments through November 11, 2004. Following is a summary of the public comments and the Department's response. A key that identifies commenters appears at the end of this document.

1. **Comment:** 45.01-7, Prospective Interim Payment. The commenter stated that the result of changing language from hospital fiscal year to State fiscal year is that hospital PIPs will be based upon older discharge data. The commenter noted that at a time when the MaineCare program is expanding, this has the result of pushing payments into future fiscal years.

(1)

Response: The Department has shifted all reimbursement from being based on individual hospital's payment years to State fiscal year to insure uniform treatment of all hospitals. Calculating discharges based on State fiscal year as part of this calculation ensures consistency. Additionally, using State fiscal year in lieu of hospital fiscal year does not have a uniform impact on all hospitals, for some it will result in the use of older data, for others newer data. No changes were made as a result of this comment.

2. **Comment:** 45.02-3, Interim and Final Settlement. The commenter stated that this section of the rule essentially says that if the Department has not properly calculated the UPL, then it will recover money from hospitals at some future point, and this would have a significant adverse financial impact on all Maine hospitals in the event that the federal government determines that the State has made payments in excess of the UPL. The commenter believes this is unfair because there is no way for hospitals to know that the State is making these payments and there is no way to stopthem. The commenter noted this section would require hospitals to reserve significant amounts of money – enough to repay large, but unknown amounts of MaineCare repayments for a period of years. The commenter believes that in addition to being poor fiscal policy, these reserves would have a huge effect on hospital operating margins, which are being tracked closely under the Dirigo Health law.

The commenter believes this section of the rule violates federal law regarding Medicaid rate-setting and the State Administrative Procedures Act. The commenter believes the proposed language violates 42 USC § 1396a(a)(13), which requires notice and comment before Medicaid payment methodologies are revised. The commenter stated the present rulemaking provides an opportunity to comment only on the general proposition that future action by a federal agency might cause the Department to vary from the text of the

current rule and to do so with retroactive effect. This opportunity does not satisfy the notice requirements in federal law, which require "a public process for determination of rates of payment under the plan for hospital services," id. at § 1396a(a)(13)(A), including publication of the proposed rates, with methodologies and justifications, with an opportunity to comment thereon.

The commenter stated the following about the APA process regarding this rulemaking:

> Moreover, section 8053(3)(D) of Maine's APA requires that a rulemaking notice, "[i]f possible, contain the express terms of the proposed rule or otherwise describe the substance of the proposed rule, stating the subjects and issues involved and indicate where a copy of the proposed rule may be obtained." The unpredictable nature of the foreshadowed UPL adjustments, in terms of both magnitude and method, fails to satisfy this fundamental notice requirement of rulemaking. In addition, the UPL language amounts to an attempt to incorporate federally promulgated payment provisions into a State rule without making an explicit reference to a specific iteration or edition of the federal standards and filing the incorporated material with the rule. Such a vague attempt to incorporate extrinsic standards is a violation of 5 M.R.S.A. § 8056(1)(B)(1-4).

The commenter also believes that this provision implies that the Department could ignore the statutory restrictions against retroactive rulemaking. Under 22 M.R.S.A. § 42(8) as enacted by P.L. 2004, ch. 612 (LD 1748), retroactive rulemaking is allowed only when it is necessary to maximize available federal revenue sources or to conform to the State Medicaid Plan. Subsection 42(8) further requires that reimbursement or other payments under an amended rule must be equal to or greater than the reimbursement under the rules previously in effect and that the State does not have the authority to retroactively adopt rules that have an adverse financial impact on any MaineCare provider and that specific statutory authority is required for adoption of a retroactive rule that has an adverse financial impact on any MaineCare provider.

(1)

Response: While the Department believes that this language is legal, as a result of this comment the language has been removed.

3. **Comment:** Section 45.02-4, Crossover Payments. The commenter stated that although MaineCare does not reimburse for crossover payments, receiving crossover billing information from MaineCare is critical for hospitals when they file for Medicare bad debt payments. The commenter requested that a sentence be added to this section requiring the State to provide crossover billing information, in a format acceptable to Medicare, to hospitals within 60 days after the close of the hospital fiscal year.

(1)

Response: This operational request for a report that does not affect Medicaid reimbursement is outside the scope of this rulemaking. No changes were made as a result of this comment.

4. **Comment:** Section 45.03-2, Prospective Interim Payment. The commenter believes this section ignores the fact that many hospitals have provided an increased amount of services to MaineCare members that in some cases exceed 17.5%. The commenter noted this level of increase is hardly surprising given that an additional 75,000 Mainers have been added to the MaineCare program in the last few years.

(1)

Response: The Department believes that a 117.5 percent cap allows reasonable room for increase in prospective interim payments. No changes were made as a result of this comment.

5. **Comment:** Section 45.03-1(A), Acute Non Critical Hospitals, Inpatient Services. The commenter stated that Section B, Outpatient Services indicates that costs are to be inflated to the current State fiscal year before the rate is reduced, and that this section only refers to inflating the rate forward to State fiscal year 2004. The commenter suggested that language be inserted in this section to make it consistent with Section B Outpatient Services.

Additionally, the commenter believes that there is an error in this section regarding the adjustment of the inpatient per discharge rate down by a factor between 1 and 1.5%. The commenter believes this section should reflect a more significant downward adjustment, and suggests that the Department revisit and correct this factor.

(1)

Response: This calculation is correct as it stands. No changes were made as a result of this comment.

6. **Comment**: Section 45.03-1(B), Acute Non Critical Hospitals, Outpatient Services. The commenter stated this section replaces the requirement of using the most recent "as filed" cost report when setting the PIP with a requirement to use the most recent "settled" cost report. The commenter noted this has the effect of using year-old data to set a hospital PIP which, again, results in pushing large amounts of hospital payments into future years. The commenter added that these changes are also repeated in sections C and D and have the same effect there.

(1)

Response: These changes in language do not reflect a change of practice, rather a more accurate description of current procedures. No changes were made to the rule as a result of this comment**.**

7. **Comment**: 45.03-2, Interim Volume Adjustment. The commenter stated that this section removes any opportunity for a hospital to request a PIP adjustment, and although the Department has not actually adjusted PIP amounts in response to hospital requests in the last few years, there should be an opportunity for a hospital to submit a request and the accompanying data. The commenter stated at the very least this would provide data to the Department by which it could better quantify any MaineCare underpayments.

(1)

Response: Hospitals may still submit information to the Department. The Department may or may not choose to initiate a review as a result of the submittal. It would not, however, be viewed as an official request. No changes were made to this rule as a result of this comment.

8. **Comment:** 45.03-3, Interim Settlement & 45.03-4, Final Settlement. The commenter stated these sections indicate that the interim and final settlements will be calculated using the same methodology as used when calculating the PIP. The commenter requested that this be clarified to say than any caps imposed on PIPs have no effect on settlement amounts. The commenter suggested adding the following sentence to these sections as well as 45.04-3 and 45.04-4: "No cap imposed on a PIP will limit or otherwise affect the determination of settlement amounts."

(1)

Response: The issue raised in this comment is already addressed in Section 45.02-3. However, to insure clarity as a result of this comment the sentence has been added as requested to the referenced sections of the rule.

9. **Comment:** 45.04-1(A), Prospective Interim Payment- Critical Access Hospitals, Inpatient Services. The commenter requested that a section be added stating that initial PIP amounts for new or converted critical access hospitals be set based upon the most current data available and not be subject to the 17.5% limit. Commenter believes setting a PIP based upon a cost report from a period when a CAH was a non-CAH makes no sense, especially when better, more accurate, data is available.

Response: The Department does not believe it is appropriate to use different data to set rates for new critical access hospitals than is used for those hospitals that are already designated as critical access. There is no difference in content or format between the cost reports submitted by non-CAH and CAH. Therefore, it is appropriate to use cost reports from a period when a CAH was a non-CAH to determine reimbursement, if those cost reports are from the time period that would otherwise have been used. However, the Department agrees that the cap is not applicable when a hospital is changing reimbursement systems. As a result of this comment the italicized phrase has been added

to Section 45.04-1: "This payment is capped at 117.5% of the weekly payment made in the previous State fiscal year *for those hospitals that were critical access hospitals during the entire previous State fiscal year*."

10. **Comment:** 45.04-1, Prospective Interim Payment. The commenter believes that eliminating the relative share payment, as proposed in this section will have a serious detrimental effect on Maine's critical access hospitals and will limit the ability of those hospitals to serve MaineCare patients. The commenter stressed how important this payment is to critical access hospitals. The commenter requests that the relative share payment be re-inserted into this rule and the amount of the payment be the "proper" annualized amount of $750,000. The commenter noted that the amount of $750,000 has always been the agreed-upon and expected level of payment and believes that the Department erred when it removed the payment from the proposed rules.

Response: In response to this comment the Department will not remove the language related to the relative share payment and has clarified in Section 45.04-1 that it is an annual adjustment. "Annualizing" the payment as the commenter suggests is too substantive a change to be considered as part of this rulemaking.

11. **Comment:** 45.04-1(A), Inpatient Services. The commenter noted that his additional comments for this section are the same as those in reference to Section 45.03; i.e. that Section B, Outpatient Services indicates that costs are to be inflated to the current State fiscal year before the rate is reduced, and that this section only refers to inflating the rate forward to State fiscal year 2004. Commenter suggested that language be inserted in this section to make it consistent with Section B Outpatient Services.

(1)

Response: The calculation as stated is correct. No changes were made to the rule as a result of this comment.

12. **Comment:** 45.04-1(B), Prospective Interim Payment- Critical Access Hospitals, Outpatient Services. The commenter noted that his comments for this section are the same as those made in reference to Section 45.03; i.e., this section replaces the requirement of using the most recent "as filed" cost report when setting the PIP, with a requirement to use the most recent "settled" cost report. The commenter noted this has the effect of using year-old data to set a hospital PIP which, again, results in pushing large amounts of hospital payments into future years. The commenter added that these changes are also repeated in sections C and D and have the same effect there.

(1)

Response: See response to comment 6.

13. **Comment:** 45.05-1, Private Psychiatric Hospitals, Prospective Interim Payment. The commenter would like the new language regarding the rate to read: "the rate will be negotiated prior to the beginning of the State's fiscal year and will become effective at

the beginning of the hospital's fiscal year." Commenter stated this will impose some discipline on completing the negotiation process, and will make the change effective for each hospital's fiscal year. The commenter noted that this change is important to effectuate provisions of settlement agreements with the hospitals, which involved varying percentages for different hospital payment years as essential in making the overall numbers work. Another commenter (1) noted that they agree with all of Commenter #2's comments for Section 45.05.

(1, 2)

Response: The Department agrees that the effective period of the rate is the hospital payment year. The Department has replaced the current sentence with the following: "The rate will be negotiated to become effective at the beginning of a hospital's fiscal year ."

14. **Comment:** 45.05-2, Private Psychiatric Hospitals, Interim Settlement. The commenter requested the Department delete the term "the hospital's as-filed cost report and…" The commenter stated this language would better describe the calculation as relying upon MaineCare's paid claims history and the percentage rate. Another commenter (1) noted that agreement with all of Commenter #2's comments for Section 45.05.

(1, 2)

Response: As a result of this comment the Department has deleted the reference in Section 45.05 to the "as-filed cost report". However the Department has added: "The Hospital is required to file a cost report with the Department." to clarify requirements.

15. **Comment:** 45.05-3, Private Psychiatric Hospitals, Final Settlement. The commenter proposed the following alternative wording for the second sentence of this section, which he believes better describes the manner in which the calculation will be carried out:

> The settlement amount shall be calculated by applying the negotiated percentage rate of the hospitals' actual charges that was established under Section 45.05-1 for the pertinent payment year, to the actual MaineCare paid claims history for that payment year, less third party liability. (2)

Another commenter (1) noted that agreement with all of Commenter #2's comments for section 45.05.

(1, 2)

Response: The Department does not believe the language proposed changes or clarifies the meaning of the rule. No changes have been made as a result of this comment.

16. **Comment:** 45.09(C), Disproportionate Share Payments, Acute Care Hospitals, other than Essential Non-State Public Acute Hospitals. The commenter believes that the

Medicare cost report is not the best or most timely source of this information. The commenter, therefore, requests that MaineCare claims data be used as the source for this calculation.

(1)

Response: This language mirrors language currently in the federally approved state plan. No changes were made to the comment as a result of this comment.

17. **Comment:** 45.09-2(A)(3), Disproportionate Share Payments, Proportionate Reduction. The commenter states that this section, when combined with subsection 2, would likely mean that there would be no DSH payments available to eligible hospitals because the DSH pool would be used entirely on federal waivers. The commenter noted this simply results in a rate reduction for many hospitals that serve large numbers of low-income patients. The commenter believes that this section is in violation of the federal law that establishes DSH funding for the purpose of reimbursing these hospitals; it is in violation because it diverts DSH funding from hospitals that the DSH payments were created to help.

(1)

Response: This language mirrors language currently in the federally approved State Plan. No changes were made to the comment as a result of this comment.

Administrative changes

In addition to the changes described above, the Department made small technical and grammatical corrections in the rule, specifically including changing an incorrect reference in Section 45.02 from 45.10 to 45.09.

In section 45.01-7 the definition of prospective interim payment is clarified with respect to the treatment of lump sum payments.

Key to Commenters

1. David Winslow
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2. John P. Doyle, Jr.
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